No. 95-1906

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

UNITED STATES OF AMERICA,

Petitioner,

v.

VERNON WATTS,

Respondent,

UNITED STATES OF AMERICA,

Petitioner,

v.

CHERYL PUTRA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

MOTION FOR LEAVE TO FILE MEMORANDUM *AMICUS CURIAE* IN SUPPORT OF PETITIONER AND MEMORANDUM OF MORRIS L. WHITMAN AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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MOTION FOR LEAVE TO FILE MEMORANDUM *AMICUS CURIAE* IN SUPPORT OF PETITIONER

Pursuant to Rule 37(b) of the Rules of this Court, Morris L. Whitman hereby moves for leave to file the attached Memorandum *Amicus Curiae*. The United States, petitioner herein, has indicated its consent to the filing of this Memorandum. The respondents have withheld their consent.

The movant is a defendant in a federal criminal case who would be directly affected by this Court's decision on the issue presented in the Solicitor General's petition. The District Judge who will be sentencing the movant on August 12, 1996, has ruled that he will include, as relevant conduct under § 1B1.3 of the Sentencing Guidelines, conduct underlying thirteen counts of bank fraud on which the movant was acquitted. Such a calculation would substantially increase the movant's sentence.

Respondents' counsel have indicated to the movant's undersigned attorney that they do not intend to file any response to the Solicitor General's petition. Accordingly, the Court will have no argument before it on the merits of the petition. We believe, for reasons summarized in our Memorandum, that the legal issue presented by the Solicitor General warrants plenary consideration by this Court, but that, on the merits, the Ninth Circuit is correct and should be affirmed.

Since no response has been filed in this case and the disposition of this case will affect the sentence imposed on the movant and will assuredly affect many other sentences imposed in district courts around the country, we ask leave to file the attached Memorandum *Amicus Curiae*.

Respectfully submitted

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MEMORANDUM OF MORRIS L. WHITMAN AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

INTRODUCTION

This Memorandum is submitted pursuant to Rule 37(2)(b) of the Rules of this Court on behalf of Morris L. Whitman, a defendant currently awaiting sentence in the United States District Court for the Western District of Tennessee on five counts of bank fraud (18 U.S.C. § 1344) after a trial in which he was also acquitted on thirteen counts of bank fraud. We support the United States' request that this Court review the decision of the Court of Appeals for the Ninth Circuit, but we believe that the decision below should be affirmed. In the Sixth Circuit, where Mr. Whitman will be sentenced on August 12, 1996, the rule is that charges on which Mr. Whitman was acquitted may be deemed "relevant conduct" for purposes of sentencing. *See United States v. Duncan*, 918 F.2d 647, 652 (6th Cir. 1990), *cert. denied*, 500 U.S. 933 (1991); *United States v. Silverman*, 976 F.2d 1502 (6th Cir. 1992) (*en banc*), *cert. denied*, 507 U.S. 990 (1993). The District Judge has already ruled that he will calculate Mr. Whitman's sentence to include, as "relevant conduct," the thirteen counts of bank fraud on which Mr. Whitman was found not guilty by the jury. This calculation will substantially increase Mr. Whitman's sentence.

If the Court grants the government's petition for a writ of certiorari, we will seek to file a brief *amicus curiae* supporting affirmance of the decision of the Court of Appeals for the Ninth Circuit.

STATEMENT

Mr. Whitman, long a respected and active businessman in Memphis, was indicted in the United States District Court for the Western District of Tennessee on January 29, 1993, on seventeen counts of bank fraud in violation of 18 U.S.C. § 1344. Each of the seventeen counts involved a loan or an attempt to obtain a loan for which Mr. Whitman had applied between March 1990 and June 1992 to purchase real estate, to maintain his real estate investments, or to pay for personal needs. Nine of the loans enumerated in the indictment were secured by real estate, and eight others were unsecured. The seventeen loans involved eleven different banks. The indictment alleged that, with respect to each of the seventeen loans, one or more false representations regarding Mr. Whitman's past or future income was misrepresented to the lending institution.

After a five-week jury trial, the jury returned a verdict finding Mr. Whitman guilty on five counts and not guilty on twelve counts. (Another bank fraud count in a separate indictment returned in the Eastern District of Louisiana was tried together with the 17-count Tennessee indictment. Mr. Whitman was also acquitted on the Louisiana count.) The five counts on which he was found guilty concerned three unsecured loans for which he had applied between April 1992 and June 1992.

During a two-day sentencing hearing held on June 17 and 18, 1996, the District Judge (Jerome Turner, J.) ruled that, in view of the Sixth Circuit's rule permitting district courts to treat "acquitted conduct" as "relevant conduct" under § 1B1.3 of the Sentencing Guidelines, he would calculate Mr. Whitman's offense level to include the twelve acquitted acts of alleged bank fraud in the Tennessee indictment and the single acquitted act of alleged bank fraud

in the Louisiana indictment because of the judge's conclusion that, notwithstanding the jury's verdict, fraud had been proved on these charges by a preponderance of the evidence. Sentencing was set for August 12, 1996.

ARGUMENT

Section 1B1.3 of the Sentencing Guidelines does not explicitly authorize a sentencing court to treat an allegation on which a defendant has gone to trial and been acquitted as "relevant conduct" for sentencing purposes. The eleven Courts of Appeals that have ruled that "acquitted conduct" may be the basis for an enhanced sentence (see Pet. for Cert., p. 8, n.2) have done so because they have read the language of § 1B1.3 broadly.

To be sure, the Commentary to § 1B1.3 states that the defendant need not "have been convicted of multiple counts" to have his conduct included in the sentencing calculation. The Commentary also says that "conviction under the statute is not required." But this language does not necessarily mean that "*acquitted* conduct" is to be included. Indeed, the Sentencing Commission did not explicitly resolve the issue notwithstanding circulation of a proposal on the subject. *See United States v. Concepcion*, 983 F.2d 369, 394 (Newman, J., dissenting) (2d Cir. 1992), *cert. denied sub nom. Frias v. United States*, 114 S. Ct. 163 (1993). Conduct that is never made the basis of a criminal charge may be included in the sentencing calculation while alleged conduct resulting in a charge on which the defendant *was acquitted* should be excluded.

This Court has noted the "special weight" given to a jury's acquittal. *United States v. DiFrancesco*, 449 U.S. 117, 129 (1980). A jury acquittal is not simply a formal

statement that guilt has not been proved beyond a reasonable doubt. It carries "particular significance" (*United States v. Scott*, 437 U.S. 82, 91 (1978)) as the outcome of a litigated battle between the prosecution and the defense over the particularized charge. To permit the prosecution to disadvantage an accused after a jury has weighed the evidence and ruled in the defendant's favor is to give undue weight to an allegation made by a party with "superior resources" that can "wear down a defendant." *United States v. DiFrancesco*, 449 U.S. at 130; *see also Dowling v. United States*, 493 U.S. 342, 355 (1990) (Brennan, J., dissenting) "strong public interest in protecting individuals against governmental overreaching"). *See also* the dissenting opinions of Chief Judge Arnold of the Eighth Circuit in *United States v. Wise*, 976 F.2d 393, 405-13 (8th Cir. 1992), *cert. denied*, 507 U.S. 989 (1993), of Chief Judge Merritt of the Sixth Circuit in *United States v. Silverman*, 976 F.2d at 1525, and of Circuit Judge Newman of the Second Circuit in *United States v. Concepcion*, 983 F.2d at 393.

This Court should grant the writ of certiorari and review this important question of construction that arises under the Sentencing Guidelines. As Mr. Whitman's case demonstrates, the issue arises in contexts other than indictments for multiple drug transactions, in which a jury finds an accused guilty on some counts and, for no apparent reason, acquits on other counts. A second situation in which the issue frequently arises is when a jury finds a defendant guilty of a substantive offense but, possibly in order to satisfy a reluctant juror or in order to be merciful, the jury acquits in the face of strong evidence on the accompanying charge of possessing a firearm while committing the offense. These cases are different from a case like Mr. Whitman's, in which a jury has acquitted him of fraud in thirteen independent loan transactions even while finding that he was

guilty in five distinct loan applications. Nonetheless, he is in jeopardy of being sentenced as if he had been found guilty on all counts of both indictments. His situation, in this regard, parallels that of the accused in the cartoon from *The New Yorker* magazine of June 17, 1996, which appears as an Appendix to this Memorandum.

Since the Guidelines do not explicitly authorize a sentencing court to consider "acquitted conduct" in the sentencing calculation, courts should be barred from using such conduct to enhance a defendant's sentence. The same "rule of lenity" that applies to criminal statutes and requires Congress explicitly to spell out terms that will harm a criminal accused (*e.g., United States v. Bass*, 404 U.S. 336, 347 (1971)) should foreclose a construction of the Guidelines that increases the imprisonment meted out to convicted defendants so long as the draftsmen of the Guidelines do not spell out and explicitly provide for such enhancement. *See, e.g., United States v. R.L.C.*, 503 U.S. 291, 305 (1992) (rule of lenity applied "to answer questions about the severity of sentencing"); *United States v. Cutler*, 36 F.3d 406, 408 (4th Cir. 1994) ("the rule may be applied in the context of the Sentencing Guidelines"); *United States v. Martinez*, 946 F.2d 100, 102 (9th Cir. 1991) ("rule of lenity requires that we infer the rationale most favorable to the appellants and construe the guidelines accordingly").

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted. On plenary consideration, the judgment should be affirmed.

Respectfully submitted

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June 1996

APPENDIX

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"Since this is only your first offense, and you've been found not guilty, I'll be lenient in my sentencing."